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In the Supreme Court of the United States

OCTOBER TERM, 1956

TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION, ET AL., *Petitioners*

v.

IVAN RANGE, ET AL.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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This memorandum is in response to the order of this Court of June 3, 1957, inviting the Solicitor General to file a brief expressing his views on the case. It is the position of the Government that the decision of the Court of Appeals of Tennessee is correct, and, therefore, the Solicitor General wishes to express his opposition to the granting of the petition for a writ of certiorari.

The facts pertinent to the question raised by the petition may be summarized as follows:

The Tennessee Burley Tobacco Growers' Association is a marketing cooperative whose membership consists of most of the burley tobacco growers in Tennessee. Its primary function has been to administer the Government's tobacco price-support program in that state pursuant to contracts between itself and the Commodity Credit Corporation (Pet. App. 1). These contracts, which are entered into on an annual basis, provide for the advancement of nonrecourse loans by Commodity Credit Corporation to the Association with which the Association can purchase tobacco on the market which fails to bring prices at the support level. The tobacco farmer is thus assured a minimum price for his product. The Association can subsequently sell the tobacco, which is pledged to Commodity Credit Corporation to secure the loans, at the support level or higher if market conditions permit (Pet. App. 17). Any amounts remaining after repayment of the government loans and deduction of all operating expenses constitute "net gains" on these sales, the beneficial interest in which is in the growers whose crops are thus sold. The annual contracts pertinent to this litigation each provided that (Pet. App. 11):

> All net gains accruing from the sale of tobacco upon which Commodity has loaned funds under this agreement shall be distributed on a fair and equitable basis to growers by the Association unless a disposition of such gains other than by distribution to such growers is requested by the Association and approved by Commodity.

For the years 1946 through 1949, petitioner purchased a considerable amount of tobacco under the loan support program. By 1952, it was able to market all of this tobacco, usually at a price higher than the support level at which the crops were purchased, so that substantial net gains in the approximate sum of $563,000 resulted (Pet. App. 18). The Association's Board of Directors proposed to make a distribution of only a portion of these net gains by cash payments to the growers, retaining the balance in a revolving capital fund for the purpose of building and maintaining a redrying plant and for other capital expenditures (Pet. App. 4-5). Distribution of this balance was made by assigning to members, on the books of the Association, equities representing their ratable shares of the net gains (Pet. App. 18).

This suit was instituted by a small number of the members of the Association as a class action to compel the Board of Directors to make a distribution in cash of the entire net gains. It was their contention that such a distribution was required by the provision in the contracts between the Association and Commodity Credit Corporation quoted above.[1] The Commodity Credit Corporation made no official ruling on the question and was not requested by the Association to approve a disposition of net gains other than by cash distribution (Pet. App. 18, 21-22). While refusing to permit the maintenance of the suit as a class action (Pet. App. 15-16), the Court of Appeals of Tennessee held that the respondents were entitled

[1] Respondents also sought to recover for alleged waste and mismanagement by the Board of Directors, but were denied this relief by the court below (Pet. App. 15). No question with respect to this issue is presented here.

to recover in cash payments the equities due them as individuals, sustaining their contention that the phrase "shall be distributed" in the quoted contract provision required a distribution in cash (Pet. App. 17-22). The Supreme Court of Tennessee denied cross petitions for a writ of certiorari (Pet. App. 27-42).

The Government believes that the judgment of the Court of Appeals is correct and that the question presented by the petition does not merit review by this Court. We agree with petitioners that the decision below turned on whether cash distributions were required as a matter of federal law in light of the contract between Commodity Credit Corporation and the Association and without regard to what the powers of the Board of Directors would otherwise be under the Association's by-laws and applicable state statutes (See Pet. App. 21, 29, 37, 63). But we believe that the court below properly sustained the respondents' position on this issue.

Requiring that net gains be distributed in the form of cash payments to tobacco growers accords with the purpose of the Government's program of supporting tobacco prices through loans issued by Commodity Credit Corporation. The purpose of this loan support program is simply "to place a floor under the price of agricultural commodities by assuring farmers a minimum price." S. Rep. No. 1022, 80th Cong., 2d Sess., p. 8 (1948). The program was designed as an income aid and production stimulus to individual growers by securing for them a price for their products at a minimum of 90% of parity. The individual farmer was to be the prime beneficiary of the government loan and was to be protected in the growing and marketing of his tobacco. The loan support program was not designed

to aid the marketing cooperatives as such, or to provide financial assistance to them in carrying out their varied activities and functions, however meritorious they might be. In the instant case, petitioners seek to use profits from the sale of tobacco crops, made possible only through loans of the federal government, to finance the Association's branching out into storage and processing fields competitive with independent warehousemen. Whether or not such activities are desirable and should be encouraged is immaterial to this litigation. The important consideration is that this was not the purpose of the federal government in providing the funds which accounted for the earning of these net gains. Marketing cooperatives have available to them many other sources of funds for needed capital expenditures. If its Board of Directors so desired, such funds could be obtained, for example, from membership fees, assessments, and profits derived from handling and processing charges. But the evident purpose of requiring by contract that the Association distribute any net gains to the growers was that the growers should receive a direct cash benefit. Since the individual farmers were obviously the beneficiaries of this contract provision, the court below properly enforced it in their favor.

Moreover, requiring cash payments more closely accords with the natural meaning of the language in the contract that all net gains "shall be distributed." This was found by the court below to be the understanding of the farmers when the Association was organized, and it conforms with the general practice of other associations administering the price-support program for tobacco (Pet. App. 5-6, 8, 21). The farmers understood that their membership fees and

service charges would be sufficient to bear all of the Association's expenses of operation. At least in part, they were led to believe that their equities would be paid to them in cash, by speeches and advertisements of the directors and representatives of the Association (Pet. App. 6). Since all parties have always agreed that the beneficial interest in net gains is in the growers whose crops are sold (Pet. 5), the requirement that net gains be distributed would seem to have some meaning other than a simple allocation of equities on the Association's books, for this would be required in any event.

We have been advised by the Commodity Credit Corporation that the regulations for the 1957 tobacco loan program, which will be published in the Federal Register in the near future, will reflect the policies here discussed by expressly requiring that net gains be distributed to growers in cash. The contracts which the agency will execute with local marketing associations administering the loan program will in turn require the associations to make such cash distributions. The new regulations thus materially detract from the importance of the question presented by the petition, since it will relate only to profits earned on tobacco crops of previous years.

Furthermore, petitioners' reliance on Commodity Credit Corporation's course of dealing as supporting their position is misplaced (Pet. 11-13). As found by the court below, Commodity Credit Corporation avoided any official ruling on the question while the litigation was pending (Pet. App. 21-22). We agree with the court's conclusions (1) that Commodity's failure to take any action cannot be deemed an approval of the Association's disposition of net gains,

and (2) that the contract provision in question contemplated affirmative formal action by the Association to obtain such approval if disposition other than by cash distributions was desired.

The amendment of the 1954 regulations so as to delete the words "in cash" does not indicate federal approval of distribution other than by cash payments as petitioners contend (Pet. 11-12). The amendment was also motivated solely by the desire to avoid an official ruling on the question at that time. The tobacco loan regulations prior to 1954 did not contain the phrase "in cash." The regulations pertaining to the crop years involved in this case (nowhere cited by petitioners) did not contain that phrase. See 14 Fed. Reg. 3733 (§ 664.105); 13 Fed. Reg. 4004 (§ 227.43); 12 Fed. Reg. 4878 (§ 277.24); 11 Fed. Reg. 12,781 (§ 275.4). The amendment of the 1954 regulations deleting the words "in cash" was simply designed to avoid a change in the phraseology which had always been employed. Similarly, the wording of the 1956 regulations does not indicate that "CCC specifically permits what the Tennessee courts in the present case have held that CCC's own contracts prohibited." (Pet. 13). The regulation requires that the entire profit from the sale of crops purchased under federal loans be distributed as "net gains" unless an association voluntarily agrees to apply one-half of this profit to other crop year loans (Pet. 12). If the latter course is adopted, only the balance constitutes "net gains" which must be distributed. But the problem remains as to what form this distribution must take. The obligation to repay loans is ultimately the obligation of the individual tobacco growers and not of the marketing cooperatives, since the growers are the real

beneficiaries of the support program. The loans are non-recourse loans and no loss can be sustained by the organizations carrying out the program (Pet. App. 17). Permitting a portion of the profits for any given year to be applied to other crop year loans does not benefit the Association itself, as would the establishment of a revolving fund for capital expenditures which the Association here seeks. It is simply a method for expediting the satisfaction of debts due the federal government. The separate consideration for an association's agreeing to apply one-half of the profits for a given crop year toward the repayment of loans for other years is a downward adjustment of the applicable interest rate by approximately one per cent.[2] But in no event is an association permitted to retain any of these funds for its own use. The funds are either used to satisfy the indebtedness of other years or they must be distributed as "net gains" to the individual farmers.

We note finally our agreement with the court below that the fact that an assignment of equities, credited

[2] § 464.806 of the 1956 regulations, quoted only in part at p. 12 of the petition, also provides (21 Fed. Reg. 3864):

> The contractual arrangement between CCC and any association may include provisions under which CCC will adjust the interest rate as outlined in paragraph (c) of this section and the association will apply, as directed by CCC, one-half of the 'overplus' from any crop year loan to the indebtedness on other crop year loans. * * *
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> (c) *Adjustment of interest rate.* In consideration of any association's agreement to apply one-half of the 1956 crop overplus to the CCC loan indebtedness of other crop years, the 1956 crop interest rate shall be adjusted annually * * * to the rate established by CCC as applicable to price support loans on the current crops, minus one percent per annum: * * *

to the individual farmer on the books of the Association, may be taxable to him as income when so assigned, has no bearing on the present controversy (Pet. App. 21). Even if such an assignment may be "a distribution of economic interest sufficient to entail tax liability" (Pet. 11), this does not aid in determining whether the Commodity Credit Corporation's contracts permit such a distribution. In resolving this issue, the controlling factor should be the purpose of Congress in appropriating funds for price-support loans by which the profits in question are earned.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

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